PUBLIC PROSECUTOR

v.

CHANG SIN CHAN & ANOR.

HIGH COURT SABAH & SARAWAK, KUCHING
TUAN RICHARD MALANJUM J.
[CRIMINAL APPEAL NO. KG. 24 OF 1994 (III)]
28 JUNE 1994

CUSTOMS: Charge of knowingly concerned in conveying uncustomed goods - Customs Act 1967, s. 135 - End of prosecution case - Acquittal - Whether proper and justified - Whether necessary ingredients proved - Presumption of knowledge - Section 135(2) - Whether rebutted.

CRIMINAL PROCEDURE: End of prosecution case - Ruling by Magistrate that prosecution failed to prove case "beyond reasonable doubt" - Whether proper - Principles in Khoo Hii Chiang v Public Prosecutor - Maximum evaluation approach - Whether wrongly applied - CPC s. 173(f).

The respondents were jointly charged with two offences under s. 135 of the Customs Act 1967, for being knowingly concerned (i) in conveying uncustomed goods with intent to defraud the Government of the duties thereon and (ii) in conveying prohibited goods with intent to evade the Customs (Prohibition of Imports) Order 1981, which applied to the goods. The facts showed that at the material time the first respondent was the driver of the lorry used in conveying the goods and the second respondent the owner of the said goods.

At the close of the prosecution's case, the learned Magistrate ruled that the prosecution had failed to prove "beyond reasonable doubt", two ingredients of the offences namely (i) "knowingly concerned in conveying" and (ii) "intention to defraud the Government" and on that ground, acquitted the respondents without calling for their defence. According to the Magistrate, the first respondent could not be said to be "knowingly concerned in conveying" the goods as he was only carrying the goods on the instruction of the second respondent. Further, the Magistrate was also of the opinion that such evidence had successfully rebutted the presumption of knowledge in s. 135(2) of the Act. As for the second respondent, the Magistrate accepted the explanation offered by the second respondent that the first respondent, in carrying the goods in the way he did, had not followed his instruction, and concluded that such explanation prevented the ingredient of "knowingly concerned in conveying" from being proven "beyond all reasonable doubt" against the second respondent.

On appeal by the Public Prosecutor, the main issue was whether in considering whether or not to call for the defence at the end of the case for the prosecution, and in acquitting the respondents thus, the Magistrate had applied the wrong principles of law and had gone against the provisions of s. 173(f) CPC.

Held:

[1] The Magistrate went too far in analysing the case of *Khoo Hii Chiang v Public Prosecutor* [1994] 2 CLJ 151 and the principles of law enunciated therein. That case should not be read as if the statutory provisions in the Criminal Procedure Code have been cast aside in considering whether or not to call for the defence in a given case.

[2] By reason of s. 173(f) CPC, the position must be that, at the close of the case for the prosecution, the Court should evaluate the evidence adduced to determine if all the ingredients of the offence have been established and if so, whether or not the accused can be convicted of the offence if he decides to remain silent or call no evidence in rebuttal after the defence has been called. It is at that later stage, it ought to be noted, that the element of "beyond reasonable doubt" comes into play. Hence at the earlier of the two stages, the proper question to ask is, can the accused be convicted of the offence based on the evidence adduced by the prosecution if, upon being called to enter his defence, he decides to remain silent or call no evidence in rebuttal, after having given maximum evaluation to such evidence.

[3] The prosecution cannot be burdened with proving its case beyond reasonable doubt even before the defence is called, for to do so would tantamount to convicting the accused even before he could adduce evidence in rebuttal. If the Court were to hold that the prosecution has to prove its case beyond reasonable doubt even before the defence is called, then it will serve no purpose to hear any evidence from the accused once such a finding is made. Further, this would also be contrary to s. 173(f) or s. 190 or such other similar provisions of the CPC.

[4] It is insufficient for the Magistrate to just consider only one aspect of the evidence adduced. In this case, although there was evidence to show that the first respondent was carrying the goods on the instruction of the second respondent, it was also in evidence that the first respondent was aware or consciously participated in conveying the said goods. It is thus not a case where the first respondent did not know that the goods were in his lorry. As such there is no reason why the first respondent cannot be said to have been "knowingly concerned in conveying" the goods in question. That apart, it is also clear that there was nothing in evidence that prevented the prosecution from relying upon s 135 (2) of the Act. Accordingly, on the evidence, the prosecution must be held to have established the ingredient of "knowingly concerned in conveying" in both the charges in respect of the first respondent.

[5] The relevant explanation of the second respondent, which the Magistrate accepted, should only be considered when dealing with the issue of intention to defraud the Government or to evade any prohibition of law pertaining to the said goods. Consequently that explanation, whatever its worth is, is no ground to say that the second respondent did not knowingly concern in conveying uncustomed goods. Again, in this respect, s. 135(2) of the Act can be relied upon by the prosecution, with the result that the presumption of knowledge that the goods were uncustomed applies. Accordingly the ingredient "knowingly concerned in conveying" the said goods had been established against the second respondent.

[6] The reasoning given by the Magistrate for holding that there was no intention on the part of the respondents to "defraud the Government" in the first charge and to "evade the prohibition" in the second charge, is clearly inadequate. In the present case the circumstances as established from the evidence of PW1, PW2, PW3 & PW9 lead to an irresistable conclusion, unless rebutted, that there was such an intention on the part of both the respondents in both the charges.

[Appeal allowed. Order of acquittal set aside and respondents ordered to enter defence on both charges].

Cases referred to:
Khoo Hii Chiang v. Public Prosecutor [1994] 2 CLJ 151 / [1994] 1 MLJ 265 ***(refd)***
PP v. Baldev Singh [1985] 1 CLJ 348 / [1985] 2 MLJ 453 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 190
Customs Act 1967, ss. 78, 135(1)(i), (iii), (e), (2)
Customs (Prohibition of Imports) Order 1981

For the appellant - Mohd Ridhuwan Bin Rasol, DPP
For the 1st respondent - Anthony Bong; M/s. Ibrahim & Co.
For the 2nd respondent - Fabian Lim; M/s. Fabian A.H. Lim

JUDGMENT

Richard Malanjum J:
This is an appeal by the prosecution. The two respondents were tried jointly for offences under the Customs Act 1967 (hereinafter referred to as "the Act") on two charges. The respondents were acquitted and discharged without their defences being called on both the charges. Further, the 2nd respondent was also acquitted and discharged on an amended charge which the learned Magistrate did on his own motion.

The original charges read as follows:

1st Charge:

That you at about 7.15 p.m. on 25 March 1986 at the junction of Tebedu/Pedawan - Tebedu Link Road, Serian District were knowingly concerned in conveying uncustomed goods to wit 35 bags x 50 kgs coffee seeds, 917 pairs "Five Star" rubber boots, 108 pairs "Kubota" Canvas shoes and 528 pairs 'Speedo' sports shoes valued at RM18,440 by means of a motor vehicle bearing registration No. KG 8151 with intent to defraud the government the duties thereon, to wit RM6,065.20 and thereby committed an offence under s. 135(1)(e) punishable under s. 135(1)(i) of the Customs Act 1967.

2nd Charge:

That you at about 7.15 p.m. on 25 March 1986 at the junction of Tebedu/Pedawan - Tebedu Link Road, Serian District were knowingly concerned in conveying prohibited goods to wit, 35 bags of coffee seeds valued at RM8,750 by mean of a motor vehicle bearing registration number KG 8151 with intent to evade the Customs (Prohibition of Imports) Order 1981 applicable to such goods and thereby committed an offence under s. 135(1)(e) punishable under s. 135(1)(iii) of the Customs Act 1967.

Briefly the evidence adduced by the prosecution are as follows:

On 25 March 1986 at about 12.30 p.m. information was received that some goods would be brought to Kuching *via* Tebedu. At about 2.15 p.m. on the same day some goods were found at the border of Indonesia and Malaysia and were already on the Sarawak side. No one was found with the goods at that time. They were left on a clearing on a hill. The Customs office was about 4 km from the border. On that day the office was opened until 8 p.m. awaiting for anyone to come to declare the goods. No one came. Though the office was opened until 8 p.m. the Customs officers decided to set up a road block at the junction of Tebedu - Serian Road and the ring-road to Padawan.

At about 7.15 a.m. a lorry bearing registration No. KG 8151 arrived at the road block. It was stopped. The driver was asked about the goods in the lorry. The Customs officers were told by the driver of the lorry that the goods were shoes. No documents were produced pertaining to the goods such as customs declaration or customs receipts. The Customs officers were also told that the goods belonged to one 'Robert'. As nothing was shown that the goods were legally brought into Sarawak the Customs officers decided to seize and detain them including the lorry for further investigation. No examination of the goods were done at the check-point but the lorry with the goods were escorted to Kuching's Customs Headquarters. At about 10.15 p.m. the lorry with the goods and the escort party arrived at the Headquarters where the matter was taken over by the Preventive Section of the Customs Department. Thereafter the goods were examined in the presence of the driver of the lorry and a list was prepared. That took place at about 12.15 a.m. on 26 March 1986. Investigation continued resulting in the 1st respondent who was the lorry driver and the 2nd respondent who was alleged to be the owner of the goods being charged for the offences preferred in the two charges above-mentioned.

The learned Magistrate in his ruling in respect of both the original charges concluded that two ingredients of the offences had not been proven beyond all reasonable doubt at the close of the prosecution's case. The two ingredients referred to by the learned Magistrate were:

(1) knowingly concerned in conveying; and

(2) intention to defraud the Government.

I shall not deal with the other ingredient namely, "that the goods were uncustomed/prohibited" as the learned Magistrate had found that ingredient to have been proven by the prosecution 'beyond all reasonable doubt'.

From my reading of the ruling of the learned Magistrate it would appear that in respect of the 1st respondent he considered the evidence adduced, namely, that the 1st respondent was only carrying the goods on the instruction of the 2nd respondent to whom the goods belonged, as the basis for him to conclude that the ingredient (1) above had not been proven beyond reasonable doubt and further, that such evidence rebutted the presumption under s. 135 (2) of the Act.

As for the 2nd respondent in respect of the ingredient (1) the learned Magistrate considered and accepted what was said by the 2nd respondent in his statement (Ex. D1) to the investigation officer of the case as having succeeded in preventing that ingredient from being proven by the prosecution 'beyond all reasonable doubt'.

With respect I think the learned Magistrate went too far in his analysis of the case of *Khoo Hii Chiang v. Public Prosecutor* [1994] 1 MLJ 265. I do not think that case should be read as if the statutory provisions in the Criminal Procedure Code have been cast aside in considering whether or not to call for the defence in a given case. The relevant statutory provision in the Criminal Procedure Code for this case reads:

> Section 173 (f)
>
> If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

What is therefore required is that there must be evidence adduced by the prosecution which can establish the ingredients of an offence in a charge preferred against an accused. If there is no evidence adduced on any of the ingredients of the offence then there is no question of the accused being called to enter on his defence. (See: *PP v. Baldev Singh* [1985] 2 MLJ 453). Further, the evidence adduced must be admissible and accepted and that if unrebutted would warrant a conviction upon the accused. Of course in considering the evidence the test of 'maximum evaluation' is to be applied. In other words, the Court should evaluate the evidence adduced to determine if all the ingredients of the offence have been established and if so, whether or not the accused can be convicted of the offence if he decides to remain silent or call no evidence in rebuttal after the defence has been called. It is at that later stage that the element of 'beyond reasonable doubt' comes into play. The question to be asked is this: Can the accused be convicted of the offence based on the evidence adduced by the prosecution if upon being called to enter on his defence he decides to remain silent or call no evidence in rebuttal and after having given such evidence adduced the maximum evaluation (beyond reasonable doubt)?

I do not think that the prosecution should be burdened with proving its case beyond reasonable doubt even before the defence is called for to do so would tantamount to convicting the accused even before he could adduce evidence in rebuttal. If the Court were to hold that the prosecution has to prove its case beyond reasonable doubt even before the defence is called then it will serve no purpose to hear any evidence from the accused once such a finding has been made. Further, that would be contrary to s. 173(f) or s. 190 or such other similar provisions of the Criminal Procedure Code.

Coming back to the ruling of the learned Magistrate I think that it is not sufficient by just considering one aspect of the evidence adduced. No doubt that from the evidence of PW1, PW6, PW9 and Ex.D1 the 1st respondent was quoted to have said that he was carrying the goods on the instruction of one 'Robert' who happened to be the 2nd respondent. But it is also in the evidence of PW1 and PW2 that the 1st respondent was aware or consciously participated in conveying the goods. It was not as if he did not know that the goods were in his lorry. As such I find no reason why the 1st respondent cannot be said to have "knowingly concerned in conveying" the goods. On the question of the status of the goods at the material time I am of the view that the prosecution can rely upon s. 135 (2) of the Act. Accordingly it is my judgment that ingredient (1) has been established in both the charges in respect of the 1st respondent.

As for the 2nd respondent it was by his own admission (Ex.D1) that he did instruct the 1st respondent to carry the goods. I do not think that issue is in dispute. All the 2nd respondent was saying was that his instruction was not followed. In my view that clarification should only be considered when dealing with the issue of intention to defraud the Government or to evade any prohibition of law pertaining to the said goods. Therefore I find no ground to say that the 2nd respondent did not knowingly concerned in conveying the goods. Again s. 135(2) of the Act can be relied upon regarding the status of the goods, that is, the presumption of knowledge that the

goods were uncustomed. Accordingly ingredient (1) of both the original charges has also been established by the prosecution in respect of the 2nd respondent.

As for ingredient (2) above, i.e. intention to defraud the Government in the first charge and intention to evade the prohibition in the second charge, I also find the reasoning given by the learned Magistrate to be inadequate. First of all the learned Magistrate only dealt mainly with intention to defraud the Government and not on the intention to evade the prohibition as stated in the second charge. He should have directed his mind on both issues. Anyway, for both issues it is the question of intention that should be considered.

Intention is difficult to prove by direct evidence as no offender would say, if he is not pleading guilty, that he intended his act. So proof of intention has to depend largely on the surrounding circumstances. And in the present case I find that the circumstances as established from the evidence of PW1, PW2, PW3 and PW9 lead to an irresistible conclusion, unless rebutted, that there was intention on the part of both the respondents in both the charges. Evidence had been adduced that the goods as found at the border were left unattended. Now if nothing was amiss then the goods would not have been left as such. Further, the goods were already in the Malaysian territory at about 2.15 p.m. and they were only 4 km from the Customs office. Yet nothing was done even though the Customs office was attended to until 8 p.m. that day. And there is no question of the 1st respondent not knowing that the goods have to be declared in the Customs office as that is the requirement of the law and he is presumed to know it.

As for the 2nd respondent his version that his instruction was not carried out appears to me to be far-fetched. If that was the case then surely the 2nd respondent would have taken steps when the goods did not arrive at his house in Tebedu. And his explanation in Ex.D1 of wanting to check the quantities of the goods before declaring to the Customs office runs contrary to the proviso of s. 78 of the Act. The proviso stipulates that declaration should be made on arrival of goods at the place of import. Thus, on this basis as well I find that 'intention' has been established by the prosecution in both the charges in respect of the 2nd respondent.

As all the ingredients have been established by the evidence adduced and which evidence would warrant a conviction if unrebutted after having given such evidence the maximum evaluation, I hereby order that both the respondents be called upon to enter on their defences on both the original charges. I set aside the order of the learned Magistrate in acquitting and discharging both the respondents on both the original charges and of acquitting and discharging the 2nd respondent on the amended charge.